No. 11706

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM BARISOFF, ROBERT I. KNUDSON, HUBERT L. DAWSON, JR., and ARTHUR M. LILLY,

Appellants,

vs.

HOLLYWOOD BASEBALL ASSOCIATION, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

I.

Additional Authority on the "Hollywood Standards" Question.

United States v. Hibbard, 83 F. (2d) 785, 786 (9 C. C. A., 1936) is further authority that the judgment should be reversed for incompetent testimony, and should be added in Appellants' Brief at page 55.

In the *Hibbard* case, this Court reversed a judgment on a war risk insurance policy entered against the government by District Judge Charles C. Cavanah, because:

> "The plaintiff's medical expert testified in response to a hypothetical question *in the form which has been so often condemned,* that in his opinion, the veteran was totally and permanently disabled prior to the time his policy lapsed in 1919. This error requires reversal." [See text and citations, 83 F. (2d) 783.]

The hypothetical question there condemned had at least the virtue of pertinency, since it called for the application of an established legal standard of disability. The hypothetical question here lacked even that virtue. No fixed standard was referred to by the phrase "play ball according to the standards of the Hollywood Club", and the questions and answers containing it were pure nebulae, or "no evidence" at all, as pointed out in Appellant's Brief at pages 54-56.

II.

The Brief of the Club Admits No "Hollywood Standards" Existed; and, Consequently, That the Phrase "Play Baseball in Accordance With the Standards of the Hollywood Club" Is Without Any Meaning Other Than Its Manager's "Intuition".

This phrase was originated by the Club's counsel in the trial. Over objection, he was permitted to use it in questioning his expert witnesses [R. pp. 133-137, 146-150, 152-154]; it was adopted in the District Court's Opinion [R. pp. 12-15 and 71 Fed. Supp. 493]; and was written into the District Court's findings prepared by the Club's counsel [R. p. 18]. The Club's own experts could not define what was meant by this phrase, under cross-examination; and each finally admitted that the test they applied was whether some other player was available whom they considered better for the team than the veteran released [R. pp. 134-137, 155].

Finally, on this appeal, the Club's Brief discloses what was the intended meaning of "Hollywood standards" question, as follows:

> "Appellants make much of the failure of the expert witnesses to describe or define a 'standard of play'

with a mathematical nicety. If such a precise formula for judging baseball ability could be found, *the finder would have something not yet known in the baseball world.* Both Manager Fausett and Scout Thurston testified to the unreliability of statistics and to the need to depend on the *intuition of experience in judging ball players."* (Club's Br. p. 21.)

We cannot agree with this statement, for two reasons pointed out below. But, at least, we have here at long last, the gist of the meaning of the phrase, as viewed by the Club. It says in effect:

> "Intuition" not "standards" is meant. The phrase, to have any meaning, since no set standards are recognized in baseball, must be modified to read "play baseball in accordance with the *intuition of experience of the team manager* of the Hollywood Club."

On this matter of the *manager's intuition,* Judge Lloyd L. Black in *Niemiec v. Seattle-Rainier Baseball Club,* 67 Fed. Supp. 705 (D. C., Wash., 1946), said:

> ". . . The employer may discharge at any time for cause, but *that cause must be something other that prediction or hunch of a manager.* And, where the baseball player and the manager disagree as to the actuality of the cause, in fairness and in accord with the American viewpoint, an independent tribunal must have a right to *hear the facts and see whether or not there be cause.* To allow the employer to decide that there will be cause in the future to discharge the employee presently is a far cry from the sportsmanship Americans the country over expect from baseball." (67 Fed. Supp. 712.)

For two reasons, we take exception to the implications of the Club's statement above quoted (Br. p. 21) because:

(1) The Club's experts were never requested to define standard of play in terms of performance statistics, *i. e.,* with "mathematical nicety". They were asked to define what they meant by the phrase "standards of the Hollywood Club", or of the Pacific Coast League. No such definition was given. We then undertook to find out whether any consideration had been given by them to the veterans' past and current performance records. None had been. Such records were available, but *emphatically* were not considered. Each finally stated that the actual test was merely his own judgment (now called "intuition") of the relative ability of the veterans as compared with another competing player, and that this was *absolutely the sole basis for the veterans' discharges.*

The Club's witnesses did not say the veterans were discharged *because* of Hollywood's alleged "standards"; but merely for the reason stated [R. pp. 134-137, 155].

(2) We are unable to agree that performance records have no place in determining a player's ability. If so, the baseball industry has been overselling the public on an erroneous thought throughout the years. Baseball clubs splash the sport pages of newspapers constantly with reports of the relative standing in a league of individual players in this or that line of baseball activity, the obvious premise being that the public will be led thereby to patronize games in which the leading players or teams are appearing, in the expectation that the players will

perform in future games in the manner in which they have done in the past. The public is not left with "intuition" as sole guide for investing their money in baseball tickets; and we suggest respectfully, this thought: Do the clubs really follow "intuition" alone in picking players? We doubt it.

Why, if the players it chose in preference to the veterans actually played better baseball than they, or if any better baseball was played by Hollywood or in the Pacific Coast League as a whole in 1946 than formerly, did the Club not *offer its records in hand to prove it?* And why, if the average player in the Pacific Coast League was any better than the veterans, were these figures not produced? Such figures would have been evidence, not mere "intuition" (*Niemiec* case, 67 Fed. Supp. at pp. 708-709, 712-713); and in view of the prior *Niemiec* decision (June 21, 1946), their absence is startling.

The Club had these figures, and a reason they were not produced may well have been that the veterans would not have suffered by the comparison.

Of course, the manager and coach may not have noticed the records when the veterans were discharged. But, in preparing this case for the trial later, it is difficult to assume *that Club's counsel did not examine those very records* to determine whether they contained evidence helpful to the Club. Their unexplained absence is itself evidence sufficient for an inference.

III.

The Club Cites No Testimony Which, in Any Way, Indicates the Veterans Did Not Possess Skill and Ability Sufficient to Play Baseball in Their Former Positions With the Club, Whether in the Pacific Coast League or Farmed Out. No One Testified They Did Not Play as Well as Formerly.

The burden of proving cause for discharge was on the Club.

Anderson v. Schouweiler, 63 Fed. Supp 802, at p. 808 (D. C., Idaho, 1945);

Hansen v. Columbia Breweries (N. C., 1942), 12 Wash. (2d) 254, 122 P. (2d) 489, 492.

The Club's Brief (p. 20) cites the Record at pages 132-134, 146-151, to support the District Court's finding on the veteran's ability; but nothing to the above effect was voiced by any witness in the pages so cited.

The sole question propounded by the Club's counsel to his witnesses was whether in their opinion the veterans had a degree of professional skill and ability "sufficient to equal the standards of the Hollywood Club."

Presumably the men were not unable to render the service they had rendered before; and no testimony was offered to counteract such presumption. (63 Fed. Supp. 808.)

When the Club's counsel finally finished his "standards of the Hollywood Club" questions, and permitted Manager

Faucett to state what was his individual opinion of the veterans' ability, in his own way, he said:

> "In my opinion their ability didn't *equal* that of the men that they were competing with for *their particular position.*" And that "was *absolutely* the sole basis" on which they were released. [R. pp. 134, 137.]

IV.

The Veterans Waived None of Their Statutory Re-employment Rights by Being Reinstated at Higher Wages.

The Club's Brief fails to cite any testimony supporting the finding, of which we complained in Specification I(d) (Applt. Br. p. 37) that the veterans' salaries on re-employment were negotiated figures "based on the right and privilege of the Respondent (Club) to terminate each such employment." [R. p. 20.]

Oscar Reichow, the sole witness whose testimony is cited by the Club in this regard, never mentioned the subject. [Club's Br. p. 19; R. pp. 108, 20.] He did affirmatively testify, however, that the ingrade salary increases were given all veterans pursuant to the rules of the National Association of Professional Baseball Leagues. This testimony negatives the idea of "negotiation" advanced by the Club. [R. pp. 120-121, 20.]

No "negotiations" about the amount of wages was mentioned by any witness whatever; and no "waiver" of

any rights appears in the restoration contracts themselves. [Exhibits Nos. 2, 6, 10, 15; R. pp. 163, 35-49.]

Aside from having no proof to support this finding, the Club abandons the language of the law in discussing this "waiver" defense, and its defense of "laches".

It recognizes, apparently, that the evidence does not bring this case within the scope of either of those doctrines; and, for manifest reasons, prefers to argue that the 1946 salary increases were "based on the right and privilege of Respondent to terminate the employment" and that the veterans "waited an unreasonable length of time to commence this action", rather than to argue directly that they "waived" their reemployment rights and were guilty of "laches". To use the true names of these defenses would at once announce their invalidity.

Because of the Club's circumlocution, and its failure to offer any proof whatever of waiver, that doctrine was overlooked in Appellants' Brief.

Waiver is inapplicable here for two reasons:

(a) Waiver is the voluntary relinquishment of a known right, which must be pleaded and proved. The Club (1) did not plead waiver and (2) offered no proof that the veterans voluntarily relinquished any part of their reemployment rights on restoration. The matter was never mentioned to them at all, orally or in writing, before or at the trial. [R. pp. 7-11, 108, 120-121.]

67 C. J. 294, 299, 302, 308, 309, 311, Waiver Secs. 2, 3, 6, 9, 11, 12.

"The intention to waive the right or advantage in question must be shown clearly and convincingly. The best evidence of intention is to be found in the language used by the parties. When the only proof of intention rests in what a party does or forbears to do, his acts or omissions to act relied upon should be so manifestly consistent with, and indicative of an intent to, voluntarily relinquish a then known particular right or benefit that no other reasonable explanation of his conduct is possible.

"To establish waiver, it has been stated, the evidence must indicate a meeting of minds as well as the intentional forbearance to enforce the right in question." (67 *C. J.* 311.)

(b) The STSA Sec. 8(c) forbids the employer to discharge a restored veteran without cause for one year; and the 1946 restoration contracts, despite Sec. 5(b) thereof, *did not give the Club the right to discharge restored veterans at will,* because:

(1) Sec. 11 of the restoration contracts modified Sec. 5(b) by providing:

"This contract is *subject to* federal or state legislation, regulations, executive or other official orders, or other governmental action, now or hereafter in effect, respecting military, naval, air or other governmental service, which may directly or indirectly affect the Player, the Club or the League;" . . . This proviso adopted STSA Sec. 8(c) and modified

Sec. 5(b) so as to forbid the Club to discharge the veterans for one year without cause." [R. pp. 40, 42.]

Niemiec v. Seattle-Rainier Baseball Club, 67 Fed. Supp. 705, at pp. 707-709 (D. C., Wash., 1946).

(2) Regardless of Sec. 11, the same proviso as to the discharge at will clause would be deemed written into Sec. 5(b) by STSA Sec. 8(c) alone because:

"Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms."

Northwest Steel R. Mills v. Com. Int. Rev., 110 F. (2d) 286 (9 C. C. A., 1940);

Farmers & M. Bank v. Fed. Res. Bank, 262 U. S. 649, 660, 63 S. Ct. 651 67 L. Ed. 1157, 1164;

Industrial Com. v. Aetna L. Ins. Co., 64 Colo. 480, 174 Pac. 589, 3 A. L. R. 1336, 1343;

United States v. Dietrich, 126 Fed. 671, 675 (C. C., Nebr. 1904).

The invalidity of the Club's defense of "laches" (called by it the defense that the veterans "waited an unreasonable length of time to sue") is pointed out in Appellants' Opening Brief (p. 51) *quod nota;* and the point that the Club is estopped by restoring the veterans to deny they were entitled thereto is covered there also (p. 50).

V.

The Club Now Admits That Baseball Players Hired Under the Uniform Players Contract Were Protected by the STSA Sec. 8, and Thus That the Niemiec Case, Not the Barisoff Case, Is Sound Law. But Its Effort to Distinguish the Niemiec Case on Its Facts Is Without Merit.

The Club was never satisfied with Judge Cavanah's holdings that baseball players have no reemployment rights under STSA Sec. 8; or that the change from a Class AA to a Class AAA league vacated any reemployment obligations of the Pacific Coast League clubs. These points, however, were the sole original bases of the judgment, as shown by the opinion filed March 11, 1947. [R. pp. 12-15.]

Not wishing to rely on these points, the Club prepared findings of fact, and secured Judge Cavanah's approval thereof, sustaining *all six points of its defense,* instead of the two passed on in the Court's opinion. [R. pp. 16-23.]

In this Court, the Club abandons the District Court's original two bases of decision with these words:

> "Without debating the soundness of the *Niemiec* case, it is sufficient to state here that the evidence in the two cases distinguishes them." (Club's Br. p. 5.)
>
> "Admittedly, the Hollywood Baseball Club could not arbitrarily reach a decision that individual players were 'not qualified' and thus *bar them from reemployment rights.*" (Club's Br. p. 20.)

Which statement is opposed to Judge Cavanah's opinion, and in view of the nebulous "standards" testimony on

which the rest of the defense hangs, should dispose of the case here favorably to the veterans, without more.

The Club, however, tries to "distinguish" the *Niemiec* case on the ground that Niemiec was formerly a first string player and star, whereas, the veterans here were merely alleged "rookies being tried out for the Hollywood team", when they were respectively inducted.

Just how the Club would have this Court distinguish between Al Niemiec, and Arthur M. Lilly who was drafted directly from the *Hollywood first string line-up,* we do not know. That fact is significantly omitted from the Club's summary of facts. [Club's Br. p. 12; App. Br. p. 29; R. pp. 62-63, 67, 163 and Ex. 5.]

Note this informative statement of the Club's conception of a "temporary position" as applied to allegedly "untested" or "unproven" players (Club's Br. p. 16), to wit:

> "Those who are gifted go on to large financial success while others attain more moderate success, and many fall by the way. There are even varying degrees among those who fall by the wayside, *so that some last only a few weeks and others last a few seasons.*"

Imagine, still "temporary" after "a few seasons".

Presumably, the Club means that only old-time stars hold "other than temporary positions" under the statute.

Essential facts are that Niemiec and Lilly were each formerly first string players, fired for the same identical alleged reason, that they did not, either of them, measure up to the supposed "standards" of their respective clubs on their return from service.

We cannot see even one legal minim of difference between the *Niemiec* and *Lilly* cases.

Neither are we able to distinguish under the statute between Niemiec and Knudson, the latter of whom had finished the baseball season immediately prior to his induction on the Hollywood active team and was under contract to report for play during the next season, also. [R. pp. 80-82.]

The status of Dawson and Barisoff as Hollywood employees at the times of their induction is covered in our opening brief (pp. 41-46) and needs no repetition here. They were not "probationary" or "temporary" in the Club's scheme of things. Certainly not "after several seasons". [R. pp. 31-33, 57, 91-94.]

The veterans were formerly all actively working for Hollywood in the positions assigned them by it. To argue they were not entitled to reemployment therein because they were not stars, or because two of them last worked in reserve positions [R. pp. 117-119], or because they did not immediately qualify in competition to fill first string positions on the active team on their return, is the same as arguing that a credit clerk is not entitled to his job back as such because he has not shown qualifications to fill the job of credit department manager. In the Club's jargon, anyone who had hope of rising to a department managership would hold merely a "temporary" or "probationary" position until he reached that high status.

VI.

Significant Omissions.

The Club's brief significantly omits any mention whatever of the National Defense Service List of the National Association of Professional Baseball Leagues under which the veterans were restored, and neglects to offer or suggest one legal precedent or reason to sustain the competency of its "Hollywood Club standards" question. These points were evidently better left untouched, in the Club's estimation. Certainly, they were not clarified for the Court by its brief.

VII.

All of the Appellants' Specification of Errors Complies With the Rules of the Court.

Aside from the fact that no effective response was possible, the Club's omission to make any effort to discuss the competency of the "Hollywood standards" question and its brief reference to Appellants' point that the Club is estopped, by restoring the veterans, to deny they were qualified and are entitled to it, seem predicated on its complaint that:

> "Apparently, the appellant seeks to enlarge the scope of this Court's review, for the Specification of Errors includes matters not set forth in the Statement of Points on which Appellants Intend to Rely." (Club's Br. pp. 4-5.)

All the specifications of errors are pertinent and incidental to the points on appeal mentioned. The specification fully complies with the rules. "Points on appeal" were never intended as a substitute for a formal "specification of errors", unless voluntarily adopted by the ap-

pellant. The points on appeal were intended for use primarily in connection with designations by counsel of portions of the record to be printed, where less than the whole is to be called for. Here all the record was printed, save and except that the useless printing of repeated Uniform Players Contracts was dispensed with by stipulation. The record so designated and printed contains every shred of evidence material to any of the errors specified, the errors are all pertinent and incidental to the points on appeal, the Club is in no way embarrassed in the presentation of its response to any specification, and the procedure followed is in strict compliance with the rules of the Court. [R. pp. 159-164; App. Br. pp. 37-40.]

Rules 19(6) and 20(2d) of this Court;

Rules 46, 52(a, b), 75(a, d, i, l) of the Federal Rules of Civil Procedure.

It was unnecessary, under the rules, for the veterans to plead an estoppel based on their reemployment. The Club's answer denied "that the petitioners were reemployed in their former positions as required by law"; and there was no need, opportunity or authority for petitioners' to plead estoppel (avoidance) in the face of this negative pregnant. [R. p. 7.]

Rules 7(a) and 8(c) of the F. R. C. P., *supra;*

31 *C. J. S.* 445-448, *Estoppel,* Sec. 153-b(2, 3);

U. S. Fidelity & Guarantee Co. v. Wilson, 41 F. (2d) 319, 324-325 (8 C. C. A., 1930;

Note: 20 *A. L. R.* 76-81.

VIII.

Proper Computation Shows Each Veteran Did Suffer a Loss of Wages in 1946.

The Club's Brief admits that the Court's finding, to wit, that the veterans "lost no wages" in 1946 is based on a computation at merely their former salary rates (before military service), not at their 1946 salary rates; and in which all their extra income from bonuses or post-season work was credited to the Club, in diminution. [R. p. 18.]

See the Club's admission on this point at page 19 of its brief. The injustice and error in so doing in our opening brief, pages 31-32, 52-53.

The following table gives the loss suffered by each veteran in 1946, computed at his 1946 salary, less all earnings elsewhere in the 1946 league season, (1) without deducting any "bonus for signing" with another club, and then (2) deducting such bonus; and gives the page in Appellants' Opening Brief where the detailed computation of loss appears.

Veteran	(1) Loss Without Deducting Bonus	(2) Loss with Bonus Deducted	Shown in Opening Brief p.
Barisoff	$ 862.50	$ 462.50	28
Lilly*	630.00	130.00	31
Dawson	676.50	226.50	34
Knudson	374.91	374.91	36
Total	$2,543.91	$1,193.91	

*Lilly earned $1,800 in postseason work not counted in this computation. (See Applt. Br. pp. 31-32.)

For additional authority that the increased salary that was, or should have been, given a veteran on reemployment, is the proper rate for computing his loss of wages, see *Parker v. Maynard Boyce, Inc.,* 74 Fed. Supp. 581, at pp. 582, 584 (D. C., So. Calif., 1946), which should be added to citations on page 52 of the Appellants' Brief.

IX.

The Errors of the District Court Specified by the Veterans Were All of Law; and Each Is Reviewable Here.

No statement of fact or testimony in Appellants' Brief is controverted by the Club's Brief. In fact, the latter appears to be in large part a skeletonized copy of portions of The Facts from our brief. The portions omitted in copying have chiefly to do with (a) the Club's and the veterans' relations on reemployment under baseball law and the National Association of Professional Baseball Leagues, (b) the incompetent question about "Hollywood standards", and (c) the computation of the veterans' loss of wages.

But, even as to the parts so skipped, the facts and testimony stated in Appellants' Brief are not disputed one whit by the Club; merely the legal conclusions drawn therefrom.

On this basis, we represent, as was our original aim, that a full statement of all the facts and testimony is accurately and impartially presented in Appellants' Opening Brief.

Only errors of law have been specified by the Appellants (Applt. Br. pp. 37-40); and all of them are reviewable here.

> "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."
>
> *Rule* 52(b), *F. R. C. P.*

When the District Court has made a "fundamental error" of law, and the findings (or more correctly, the legal conclusion) based thereon are "clearly erroneous", such findings may be set aside, as not being supported by the evidence.

> *Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U. S. 10, 21, 56 S. Ct. 23, 80 L. Ed. 9, sustaining *City of Los Angeles v. Borax Consolidated,* 74 F. (2d) 901 (9 C. C. A., 1935);
>
> *United States v. Hibbard, supra;*
>
> *Rule* 52(b), *F. R. C. P., supra.*

X.

Baseball Is Not Exempt From the Common Obligation to Reemploy Veterans.

The admission by the Club (Br. p. 20) that neither baseball in general, nor Hollywood in particular, was exempt from the statutory obligation to restore their returning players would seem to settle that question for all purposes. But it is not inappropriate to observe, nevertheless, that neither the Club nor the Court's Opinion have disclosed how a baseball club, with the number of players under contract limited by association rule, is legally different from any business enterprise, the number of employees of which is limited by business economics just as effectively, and which is likewise highly competitive in its operations.

We repeat that baseball clubs are embraced in the congressional language "in the employ of any employer" appearing in STSA Sec. 8(b); that Sec. 5(b) of the Uniform Players Contract stands modified by Sec. 11 thereof, and by the law itself, so as to forbid by contract the discharge at will of a veteran for one year after his return, unless he gives legal cause for discharge; and that it is not unreasonable to require that Hollywood compete on equal terms with all other clubs which, willingly or unwillingly, obeyed the law as written.

Conclusion.

No good reason appears why the *Niemiec* case in full should not be adopted and applied by the Court; and if that is done, the veterans will be granted appropriate relief here.

Reference is again made to the veterans' original brief for the principal discussion of the facts and law of the case. The Reply Brief is intended merely to clarify some of the appellee's claims.

Respectfully submitted,

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